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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON
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10 CURTIS MARSDEN,)
11 Plaintiff,) No. 04-1175-HU
12 v.)
13 SPENCER ABRAHAM, Secretary) OPINION AND ORDER
14 U.S. Department of Energy,)
15 Defendant.)

16 Judy Danelle Snyder
17 Holly Lloyd
18 Law Offices of Judy Snyder
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20 Portland, Oregon 97205
21 Attorneys for plaintiff

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28 Attorneys for defendant

HUBEL, Magistrate Judge:

Plaintiff Curtis Marsden brought this action against his
employer, Bonneville Power Administration (BPA), a federal agency

1 of the Department of Energy, asserting claims under the
2 Rehabilitation Act of 1973, 29 U.S.C. § 791, for disability
3 discrimination and failure to accommodate his disability.

4 Both parties request summary judgment on the issue of whether
5 plaintiff's major depressive disorder constitutes a "disability" as
6 that term is defined in the Rehabilitation Act. Defendant also
7 seeks summary judgment on the issue of whether plaintiff ever
8 requested accommodation for a disability.

9 **Factual Background**

10 Plaintiff has recurrent major depressive disorder, a chronic
11 condition first diagnosed in 1991. Complaint ¶ 10. He receives
12 treatment for this condition, including therapy and medication.
13 Plaintiff's Affidavit, ¶ 2.

14 Plaintiff was hired as an Information Technology Specialist at
15 the Transmission Information Systems (TIS) branch of the BPA on
16 August 25, 2002. Complaint, ¶ 6. His unit worked at the Vancouver
17 Ross Complex in Vancouver, Washington. Id. Arlene Miller was
18 plaintiff's technical lead and assigned him his daily work. Id. at
19 ¶ 7. Orla Kirking-Kahl was plaintiff's supervisor. Id. at ¶ 8. Dale
20 Prill was plaintiff's second-level manager. Id. at ¶ 9.

21 Plaintiff's appointment was subject to the completion of a
22 one-year probationary period. Id. at ¶ 6. When plaintiff was hired,
23 he did not disclose to anyone at BPA that he had depressive
24 disorder. Filer Declaration, Exhibit 3, ¶ 4. Before being hired at
25 BPA, plaintiff had never requested employer accommodation for his
26 depression. Plaintiff's Deposition 36:8-10, Filer Declaration,

1 Exhibit 5 (hereinafter Plaintiff's Deposition).

2 On October 4, 2002, plaintiff left work at 3:00 p.m. without
3 informing anyone or submitting a leave slip. Complaint, ¶ 11. Later
4 that day, he was admitted to a hospital for mental health
5 treatment. Id. Plaintiff called Miller from the hospital and left
6 a message that he had been hospitalized and did not know how long
7 he would be there or when he could call again. Id. On October 8,
8 2002, plaintiff returned to work. Id. However, upon his return to
9 work he did not reveal that he had been hospitalized for
10 depression, and did not request accommodation for that condition.
11 Filer Declaration, Exhibit 3, ¶ 4.

12 In mid-October, Kirking-Kahl discussed with plaintiff the fact
13 that he had little or no accumulated leave left; she cautioned him
14 to be judicious in his expenditure of it. Deposition of Orla
15 Kirking-Kahl 68:13-20, 70:7-14, Lloyd Affidavit, Exhibit A
16 (hereinafter Kirking-Kahl Deposition).

17 On November 5, 2002, plaintiff received a performance review
18 from Kirking-Kahl. Id. During the review, Kirking-Kahl again noted
19 plaintiff's use of sick leave and annual leave. Plaintiff disclosed
20 that he suffered from a medical condition that caused him to have
21 a depressed demeanor, for which he was receiving treatment. Id.
22 Plaintiff received a satisfactory rating on his review. Id.

23 In December 2002, Kirking-Kahl asked plaintiff to send her an
24 email upon arrival and departure from work every day in December,
25 because Miller had complained that plaintiff's arrival and
26 departure times did not correspond to his time sheet. Complaint,

1 ¶ 14.

2 On May 28, 2003, plaintiff had another performance review.
3 Kirking-Kahl expressed criticisms of plaintiff, among them frequent
4 use of sick leave and falling asleep in meetings. Complaint, ¶ 16.
5 Kirking-Kahl testified at her deposition that she saw plaintiff
6 fall asleep at a meeting. Kirking-Kahl Deposition 135:6-14.
7 Plaintiff told Kirking-Kahl that his medical condition was
8 depression, and that it deprived him of energy and caused memory
9 lapses, periods of "blacking out," which he believed had been
10 mischaracterized as falling asleep in meetings, and tremors in the
11 hand. Id.; see also 111:12-21; Filer Declaration, Exhibit 2, p. 18.
12 However, plaintiff has also acknowledged that he became drowsy and
13 nodded during meetings on three occasions. Filer Declaration,
14 Exhibit 3, p. 9. Plaintiff asked Kirking-Kahl if he could be
15 excused from long, dry meetings where he was not an active
16 participant to avoid the problem of drowsiness, and said he would
17 have his medication adjusted to counter the problem if possible.
18 Complaint, ¶ 17; Filer Declaration, Exhibit 4, p. 7; Plaintiff's
19 Deposition 120:15-20.

20 On June 23, 2003, plaintiff was terminated from BPA, before
21 expiration of his probationary period. Complaint, ¶ 19. On July 21,
22 2003, plaintiff filed an informal complaint with the EEO. Id. at ¶
23 20. On August 12, 2003, plaintiff submitted a formal complaint to
24 the United States Department of Energy. Id. at ¶ 21. On June 4,
25 2004, plaintiff received a Final Agency Decision with a Notice of
26 Right to Sue. Id. at ¶ 22.

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As a federal employee, plaintiff's claims are governed by the Rehabilitation Act. The rights, procedures, and remedies of the Rehabilitation Act are coextensive with those of the Americans with Disabilities Act (ADA). 42 U.S.C. 12133; Bragdon v. Abbott, 524 U.S. 624 (1998); see also Ferguson v. City of Phoenix, 157 F.3d 668, 673 (9th Cir. 1998).

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1 disability. 29 U.S.C. § 794(a); Kennedy v. Applause, Inc., 90 F.3d
2 1477, 1481 (9th Cir. 1996) (ADA).

3 **Discussion**

4 The issue before the court on these motions is whether
5 plaintiff has established that he is an individual with a
6 disability within the meaning of the Rehabilitation Act. Defendant
7 contends that he has not, because plaintiff has not identified a
8 major life activity that is substantially impaired by his
9 depression. Plaintiff contends that his depression does impair
10 several major life activities, including sleeping, eating, caring
11 for himself, performing daily tasks, cognitive functions, and
12 interaction with others.

13 An individual has a disability if he has a physical or mental
14 impairment which substantially limits one or more major life
15 activities. 29 C.F.R. § 1630.2(g). The implementing regulations for
16 the ADA expand upon the statutory definition. Under them, an
17 impairment is substantially limiting if it "significantly restricts
18 as to the condition, manner or duration under which an individual
19 can perform a particular major life activity as compared to the
20 condition, manner or duration under which the average person in the
21 general population can perform that same major life activity." 29
22 C.F.R. § 1630.2(j)(1)(ii). Major life activities include "functions
23 such as caring for oneself, performing manual tasks, walking,
24 seeing, hearing, speaking, breathing, [and] learning..." Id. at
25 1630.2(i). In addition, the regulations enumerate the following
26 factors that should be considered in determining whether an

1 individual is substantially limited in a major life activity: 1)
2 the nature and severity of the impairment; 2) the duration or
3 expected duration of the impairment; and 3) the permanent or long
4 term impact, or the expected permanent or long term impact of, or
5 resulting from, the impairment. Id. at § 1630.2(j)(2).

6 A person whose physical or mental impairment is corrected by
7 medication or other measures does not have an impairment that
8 "substantially limits" a major life activity. Sutton v. United Air
9 Lines, Inc., 527 U.S. 471, 483 (1999).

10 Defendant asserts that plaintiff cannot carry his burden of
11 proving that he has a disability because his own pleadings,
12 statements to the EEO, deposition testimony, and responses to
13 interrogatories establish that he is not substantially limited in
14 a major life activity, that to the extent he has an impairment, it
15 is corrected or mitigated by medication, and that he worked for
16 many years without accommodation.

17 In his complaint, plaintiff alleges that his condition
18 "substantially impairs one or more ... major life activities,
19 including sleeping, eating, caring for himself, performing daily
20 tasks, cognitive functions, and interaction with others." Complaint
21 ¶ 10.

22 At plaintiff's deposition, defendant's counsel announced that
23 he was going to "go through several major life activities" and ask
24 plaintiff about his ability to engage in them. Plaintiff's
25 Deposition 94:7. In response to defense counsel's questions,
26 plaintiff acknowledged that he was able to care for himself, *i.e.*,

1 buy groceries, wash clothes, brush his teeth, and eat meals,
2 although he said he would often skip eating without being aware of
3 it when he was severely depressed. Id. at 94-97. In response to
4 further questioning, plaintiff acknowledged that he was able to
5 perform manual tasks, walk, see, eat, hear, speak, and breathe
6 except for episodic hyperventilation, during an anxiety episode.
7 Id. Plaintiff testified that he has a "lot of trouble" sleeping,
8 for which he takes medication; when he takes the medication he is
9 able to sleep. Id.

10 _____Plaintiff testified that he had problems concentrating while
11 he was employed at BPA, but that they were atypical and did not
12 affect his ability to work:

13 A: Concentrating and keeping my focus was something
14 that was a problem during that time. I noticed it
15 in contrast to what [sic] traditionally I have had
16 a very strong developed ability to focus and keep
17 my concentration--unbroken concentration really and
18 follow through on what I am doing. And during this
19 time--I couldn't stay focused on what I was doing.
20 It was hard.

21 Q: Are you able to write the programs?

22 A: Yes, but there would be a lot of times where I would be
23 looking at a screen and it was kind of like I spaced out
24 for a second. And then I'd look back at the screen and
25 say, "What was I-- what was I just doing? ... But it never
26 prevented me from getting things done by the deadlines
27 that were given to me. Had I not had that issue I
28 certainly would have gotten done things [sic] more
quickly. ... [B]ut I don't believe that it resulted in
there being an increase in the number of errors.

Id. 99:4-17, 99:20-22, 99:25, 100:1-5. Asked whether his depression
affected his ability to perform the duties of his position,
plaintiff responded:

A: I don't believe it did. I got all my work done. I

1 got it done within the time frame that was allowed
2 me. I received multiple commendatory comments in
the forms of emails and phone calls from the people
3 in Logistics.

4 Id. 119:2-6.

5 Plaintiff testified that he was first diagnosed with major
6 depressive disorder in 1991, but that he was not restricted, by
7 the illness itself or by the medication he takes, from performing
8 any tasks or from anything else except that he had been told by one
9 doctor to avoid highly stressful situations. Plaintiff's Deposition
10 93:9-22. He has never received assistance or benefits as a result
of his illness. Id. 94:1-3.

11 Defendant argues that this testimony proves that during the
12 time he worked at BPA, plaintiff was not substantially limited in
13 the major life activity of working.

14 Further, defendant points to other deposition testimony from
15 plaintiff indicating that, with medication, his depression was
16 largely controlled:

17 Q: When you take medications, are you able to control
18 the problems you have that you've told me about?

19 A: It doesn't completely eliminate them, but it helps
20 significantly.

21 Q: Could you give me a percentage of the time that the
impairments are under control?

22 A: Well, more than a percentage of the time, I would tend to
23 qualify it as a percentage of control overall. Like if,
24 you know, a ten is I'm completely happy and one is
suicidal, you know, with these medications it helps keep
me at about a seven.

25 Id. 105:15-25, 106:1. Defendant argues that under Sutton, plaintiff
26 is not substantially limited by his depression because it is

1 correctable with medication.

2 In response to defendant's motion, plaintiff has submitted an
3 affidavit in which he states that he has experienced approximately
4 five severe depressive episodes since 1991. In 1991, the episode
5 lasted about a year; in 1997, an episode lasted about a year and a
6 half; an episode which began in 2001 extended into the period of
7 his employment with BPA, lasting approximately two years;
8 immediately after his termination from BPA in June 2003, the
9 episode lasted about one and a half years. The most recent episode
10 began in May 2005 and continues. Plaintiff's Affidavit ¶ 4. Each
11 severe episode "tends to be more severe than the previous episode
12 and tends to occur after a shorter interval." Id. Between the
13 severe episodes, plaintiff has chronic depression and generalized
14 anxiety, for which he takes medication on an as-needed basis. Id.
15 at ¶ 5. Even between severe episodes of depression, plaintiff
16 states that he continuously suffers from difficulty sleeping and
17 eating, interacting with others, performing daily tasks such as
18 household chores, and impaired cognitive functions, particularly
19 memory. Plaintiff's Affidavit ¶¶ 3, 5.

20 Plaintiff states that as a result of his depression, he
21 experiences a "constant state of mental, self-inflicted torment
22 that drains me [sic] from the ability to enjoy life." Id. at ¶ 3.
23 He experiences anxiety, feelings of hopelessness, low self esteem,
24 and guilt, as well as a "frequent inability to control my emotional
25 reactions to things in an appropriate manner." Id. It is "fairly
26 common" for him to overreact to events and become obsessive in

1 dwelling on them. Id.

2 Plaintiff states in his affidavit that he continues to take a
3 variety of medications to keep him in a "maintenance mode which my
4 doctors still feel needs to be improved upon." Id. at ¶ 5. However,
5 even between full-fledged episodes of depression, in addition to
6 generalized anxiety, plaintiff suffers continuously from difficulty
7 sleeping and withdrawing from people he perceives as being the
8 source of stressful situations. Id. Plaintiff states in his
9 affidavit that there "continues to be a correspondence between my
10 cognitive functions, memory in particular, and the degree to which
11 I feel in state [sic] of anxiety and depression. ..." Id.

12 Plaintiff states that his difficulty sleeping is manifested by
13 insomnia, so that he cannot fall asleep until early morning and is
14 constantly waking up. Plaintiff's Affidavit ¶ 6. When experiencing
15 a severe depressive episode, "the sleeping medication helps, but
16 falls far short of eliminating the problem." Id. During episodes of
17 severe depression he still "virtually always" remains awake until
18 sunrise, getting only two to five hours of sleep. Id. He states
19 that there have been at least two dozen occasions where he was
20 unable to fall asleep at all, and went for almost 36 hours without
21 sleep. Id. He states that he also experiences dreams and nightmares
22 that "can constantly wake me up, on an average of three times a
23 week," and that his wife has had to wake him on over a dozen
24 occasions "where I am screaming in my sleep." Id. He frequently,
25 even during times outside severe episodes, wakes up "more exhausted
26 than before I went to sleep." Id. The frequency of the problem

1 "approximately doubles during a severe episode." Id. Plaintiff
2 states that from mid-2001 through the period of his employment at
3 BPA, he got very little sleep each night. Id. He states that as a
4 result of his problems with sleeping, he often experiences daytime
5 drowsiness, which can "also be aggravated by my medication." Id.
6 According to the affidavit of plaintiff's father, Fred Marsden,
7 plaintiff was often awake and sitting at his computer at two or
8 three o'clock in the morning. Declaration of Fred Marsden, ¶ 6.

9 According to plaintiff's affidavit, during depressive
10 episodes, he loses his appetite and does not eat, until he becomes
11 "so light-headed, especially when getting up out of my chair, that
12 I literally stumble and cannot walk in a straight line." Id. at ¶
13 7. Even at those times when he does eat, he states, "the act of
14 eating is not enjoyable;" although "[l]iquids seem to retain some
15 appeal ... solids do not." Id. He states that during the severe
16 episode coinciding with his divorce and his employment with BPA, he
17 lost about 40 pounds during a three-month period. Id.

18 Plaintiff states that depression also affects his cognitive
19 abilities, and has caused him to lose "significant spans of time."
20 Id. at ¶ 8. He states that during a major depressive episode in
21 1991, he remembers "probably less than about 5% of the things that
22 happens [sic] during a contiguous 4-month period." Id. He states
23 that during the entire time he was employed with BPA, his memory
24 loss became more pronounced, causing him to have increased
25 difficulty remembering things on a day to day basis. Id. He also
26 experienced trouble concentrating and staying focused during that

1 time. Id. Plaintiff states that it is not uncommon for him to
2 "blank out" for a period of several seconds, "as if I become
3 catatonic for a moment lasting several seconds, during which I am
4 unable to respond to others or even really be aware of them." Id.
5 During these periods of "blanking out" whatever he was thinking
6 about is lost and he has to "struggle to regain the memory of what
7 I was just doing or saying." Id. This "blanking out" can occur in
8 mid-sentence, and is more pronounced during a major episode. Id.
9 Although he was taking Welbutrin and Zoloft, the medications were
10 not effective in reducing his symptoms during the severe episode of
11 October 2002, and he still suffered from suicidal ideation,
12 depression and anxiety. Id. at ¶ 13.¹

13 Plaintiff states in his affidavit that he experiences social
14 withdrawal as a result of his depression, avoiding interacting with
15 others or going out in public. Id. at 9. He states that he does not
16 feel he has "the energy to engage other people and that whatever I
17 say to them is a waste of effort because the content will be
18 utterly meaningless ... given my state of hopelessness and feeling
19 of futility about life." Id. He states that his depression also
20 "substantially impacts" his ability to interact with others. Id. He
21 constantly makes an effort to avoid interacting with people who are

22
23 ¹ Dr. Lin's notes indicate that the severe episode which
24 triggered plaintiff's October 2002 hospitalization was preceded
25 by plaintiff's having forgotten to take his medication, and that
26 when he did remember to take it, he "encountered immediate
27 benefit and relief." Lin Declaration, Exhibit B, p. 25.

1 not family members. Id. He does most things alone and rarely spends
2 time with anyone outside the family. Id.

3 Plaintiff states in his affidavit that his depression also
4 interferes with his ability to perform daily household tasks, such
5 as housework, laundry, dishes, and caring for the yard. Id. at ¶
6 10. During his employment at BPA, his father was staying with him
7 three days a week, doing his laundry, cleaning his house, and
8 bringing food that plaintiff could not eat. Id. at ¶ 10.

9 Plaintiff states that he has taken various medications for his
10 depression, and that the medications "have helped with the symptoms
11 of my depression, but they have never completely eliminated the
12 symptoms I experience." Id. at ¶ 11. The medication does not
13 prevent severe depressive episodes, and it has also "caused or
14 contributed to symptoms of depression." Id.

15 Plaintiff states that when he first began working at BPA in
16 August 2002, he was experiencing a severe depressive episode, the
17 result of a recent divorce, being laid off from a job, relocating,
18 starting a new job, buying a new home, and "issues with my
19 girlfriend." Id. at ¶ 12. He states that after his discharge from
20 the hospital in October 2002, he continued to experience suicidal
21 ideation, insomnia and sleep disturbance, anxiety, and low energy.
22 Id.

23 In October 2002, he was taking Wellbutrin and Zoloft. Id. at
24 ¶ 13. While these medications "generally help reduce the symptoms
25 I experience, they were not effective in reducing my depression and
26 anxiety during the severe depressive episode in October 2002, nor

1 did they prevent it from occurring." Id.

2 In reply, defendant argues that plaintiff has improperly
3 attempted to contradict his sworn deposition testimony with a
4 later, inconsistent declaration. See Disc Golf Ass'n, Inc. v.
5 Champion Discs, Inc., 158 F.3d 1002, 1008 (9th Cir. 1998).

6 The court may disregard sham affidavits that contradict
7 deposition testimony, and are submitted to generate an issue of
8 fact. Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 266-67 (9th
9 Cir. 1991). However, the party opposing a motion for summary
10 judgment is not precluded from elaborating upon, explaining or
11 clarifying prior testimony; minor inconsistencies that result from
12 an honest discrepancy, a mistake, or newly discovered evidence
13 afford no basis for excluding an affidavit. Leslie v. Grupo ICA,
14 198 F.3d 1152, 1158 (9th Cir. 1999).

15 Defendant argues that plaintiff's affidavit goes beyond
16 elaborating, explaining, or clarifying deposition testimony,
17 seeking instead directly to contradict plaintiff's previous
18 statements that his medications helped significantly to control the
19 symptoms of his depression; that he was able to perform household
20 tasks such as buying groceries and doing laundry; that he was able
21 to eat except for skipping meals during a severe episode; and that
22 he was able to sleep with medication. Defendant also points to
23 other evidence proffered by plaintiff which contradicts statements
24 made in the affidavit, such as the notation by his treating
25 psychiatrist, Dr. Lin, that on October 18, 2002, a few days after
26 plaintiff was hospitalized for a severe episode of depression,

1 plaintiff had reported that "[a]ppetite and sleep are OK."
2 Declaration of Margaret Lin, M.D., Exhibit B, p. 19.

3 Defendant also cites to deposition testimony in which
4 plaintiff describes 1) supervising other people and acting as a
5 team leader during earlier employment situations;² 2) having a
6 roommate who was a BPA co-worker from September 2002 to September
7 2004;³ 3) consulting not only mental health professionals, but also
8 medical practitioners for bursitis, high blood pressure, and high
9 cholesterol, and having dental work done;⁴ 4) assisting his mother
10 with her surgery;⁵ 5) buying a house and moving from Olympia to
11 Vancouver, Washington,⁶ and 6) going to movies with friends.⁷
12 Defendant argues that all this evidence directly contradicts
13 plaintiff's affidavit testimony that he avoids interacting with
14 others, has no energy to engage other people, does most things by
15 himself and rarely sees people outside the family, and has

17 ² Plaintiff's Deposition 16:9-17 (project coordinator with
18 AMGEN); 18:23-19:1 (supervising two people at Born Information
19 Services in 1997); 28:5-6, 29:16-18 (head of development team at
20 Global Enterprise Solutions in 1999); 31:16-18 (senior project
21 manager at Illuminette in 2001).

22 ³ Plaintiff's Deposition 51:18-23.

23 ⁴ Id. 144:7-25.

24 ⁵ Id. 148:5-11.

25 ⁶ Id. 148:20-22.

26 ⁷ Id. 101:23-25, 102:3-9.

1 cognitive difficulties, trouble remembering things, and difficulty
2 performing daily tasks such as household chores.

3 Plaintiff argues that his affidavit does not contradict, but
4 supplements and adds detail to, his deposition testimony, which he
5 is permitted to do. See, e.g., Messick v. Horizon Indus. Inc., 62
6 F.3d 1227 (9th Cir. 1995); Garrett v. Federal Express Corp., 2005
7 WL 773757 (D. Or. 2005).

8 Plaintiff testified at his deposition that he was able to buy
9 groceries, do laundry, and eat meals except for missing meals
10 without being aware of it when severely depressed. Dr. Lin's notes
11 indicate that plaintiff reported to her in October 2002 that
12 sleeping and appetite were "OK." This evidence seems inconsistent
13 with plaintiff's statements in his affidavit that during the acute
14 episode in October 2002, he lost 40 pounds and his father had to
15 throw away food that had gone uneaten.

16 Plaintiff testified to working in supervisory jobs in 1999 and
17 2001. However, according to plaintiff's affidavit, he was in the
18 midst of severe, prolonged episodes of acute depression in 1999 and
19 2001. Plaintiff's testimony about working as a supervisor or team
20 leader seems inconsistent with his statements in the affidavit that
21 he constantly makes an effort to avoid interacting with others, and
22 that he does not have the energy to engage other people. His
23 references in his deposition to seeing movies with friends seems
24 inconsistent with his statement in the affidavit that he does most
25 things by himself and rarely spends time with anyone outside the
26 family.

1 Although plaintiff has testified in his affidavit that he
2 "lost significant spans of time" because of depression, remembering
3 less than 5% of the things that happened during a four-month period
4 in 1991, and having the memory loss become "more pronounced" while
5 he was at BPA, his deposition testimony was that concentration and
6 memory problems at BPA were "in contrast to" his previous "very
7 strong developed ability to focus and keep my concentration--
8 unbroken concentration really and follow through on what I was
9 doing." Plaintiff's Deposition 99:4-17. Plaintiff also testified at
10 his deposition that his periods of "spacing out" while at BPA
11 lasted a matter of seconds, and did not affect his ability complete
12 his work in a timely manner and with "multiple commendatory
13 comments." Id. 119:2-6.

14 Plaintiff testified at his deposition that during the time he
15 was employed at BPA, he was able to attend to medical and dental
16 appointments, buy a house, move, and care for his convalescing
17 mother. This testimony indicates that plaintiff's memory
18 impairments and inability to concentrate did not substantially
19 limit his ability to engage in activities requiring concentration
20 and remembering, such as buying a house, caring for a convalescing
21 parent, and making and keeping appointments.

22 Upon consideration of this evidence, I conclude that although
23 plaintiff's affidavit may present ample opportunities for
24 potentially effective cross-examination, for its contrast with the
25 deposition testimony, the affidavit is not sufficiently directly
26 contradictory to justify disregarding it.

1 Defendant has requested summary judgment on the issue of
2 accommodation, contending that because plaintiff did not request
3 accommodation, BPA had no obligation to engage him in interactive
4 dialogue.

5 Plaintiff has alleged that BPA "failed to engage in the
6 interactive process with [him] after learning that [he] suffered
7 from a disability and requested accommodation..." Complaint, ¶ 1.
8 BPA argues that plaintiff did not request any type of accommodation
9 when he was hired and did not request an accommodation during the
10 June 23, 2003 meeting in which he was notified of his termination.
11 BPA argues that plaintiff's disclosure at the May 28, 2003 meeting
12 that he suffered from depression and his request that he be excused
13 from dull meetings because his medication made him drowsy, was
14 occasioned by plaintiff's realization that he was in danger of
15 losing his job, and even then this was not enough to constitute a
16 request for accommodation.

17 Plaintiff argues that BPA's obligation to engage in the
18 interactive process was mandated by his disclosure at the May 28,
19 2003 meeting with Kirking-Kahl and request to be excused from
20 meetings. Plaintiff argues that Kirking-Kahl made no inquiries
21 about plaintiff's medical condition, or need for accommodation, at
22 that meeting.

23 Generally, the interactive process "is triggered either by a
24 request for accommodation by a disabled employee or by the
25 employer's recognition of the need for such an accommodation."
26 Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000)

1 vacated on other grounds, 535 U.S. 391 (2002). The employer should
2 initiate the reasonable accommodation process without being asked
3 if the employer: "(1) knows that the employee has a disability,
4 (2) knows, or has reason to know, that the employee is experiencing
5 workplace problems because of the disability, and (3) knows, or has
6 reason to know, that the disability prevents the employee from
7 requesting a reasonable accommodation." Id. (internal quotation
8 omitted). As the court explained in Humphrey v. Memorial Hospitals
9 Ass'n, 239 F.3d 1128, 1137-38 (9th Cir. 2001):

10 Once an employer becomes aware of the need for
11 accommodation, that employer has a mandatory obligation
12 under the ADA to engage in an interactive process with
13 the employee to identify and implement appropriate
14 reasonable accommodations. Barnett v. U.S. Air, 228 F.3d
15 1105, 1114 (9th Cir. 2000). "An appropriate reasonable
16 accommodation must be effective, in enabling the employee
17 to perform the duties of the position." Id. at 1115. The
18 interactive process requires communication and good-faith
19 exploration of possible accommodations between employers
20 and individual employees, and neither side can delay or
21 obstruct the process. Id. at 1114-15; Beck v. University
22 of Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir.
23 1996) ("A party that obstructs or delays the interactive
24 process is not acting in good faith. A party that fails
25 to communicate, by way of initiation or response, may
26 also be acting in bad faith."). Employers, who fail to
27 engage in the interactive process in good faith, face
28 liability for the remedies imposed by the statute if a
reasonable accommodation would have been possible.
Barnett, 228 F.3d at 1116.

21 As to what constitutes good faith participation in the
22 interactive process regarding an accommodation, one court has
23 stated that "[e]mployers can show their good faith in a number of
24 ways, such as taking steps like the following: meet with the
25 employee who requests an accommodation, request information about
26 the condition and what limitations the employee has, ask the

1 employee what he or she specifically wants, show some sign of
2 having considered employee's request, and offer and discuss
3 available alternatives when the request is too burdensome." Taylor
4 v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999).

5 Plaintiff has presented evidence sufficient to create a fact
6 question for the jury on whether BPA had an obligation to engage in
7 the interactive process with plaintiff to determine whether
8 accommodation for plaintiff's depression was necessary.

9 I conclude that genuine issues of fact exist on the issue of
10 whether satisfies the definition of disability, and on the issue of
11 whether BPA had an obligation to engage in the interactive process
12 with plaintiff. Accordingly, both parties' motions for summary
13 judgment (doc. ## 20, 25) are DENIED.

14
15 IT IS SO ORDERED.

16
17 Dated this 28th day of October, 2005.

18
19 /s/ Dennis James Hubel

20 Dennis James Hubel
21 United States Magistrate Judge
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